

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS
2
3 JOHN A. SHEA,)
4 Plaintiff,)
5 vs.) Case No. 16-793C
6 UNITED STATES OF AMERICA,)
7 Defendant.)
8 -----)
9
10 Courtroom 4
11 Howard T. Markey National Courts Building
12 717 Madison Place, N.W.
13 Washington, D.C.
14 Wednesday, March 20, 2019
15 10:00 a.m.
16 Trial Volume 3 - Closing Argument
17
18 BEFORE: THE HONORABLE CHARLES F. LETTOW
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24
25 Jen Razzino, CER, Digital Reporter

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Trial - Closing Argument

John A. Shea v. USA

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1 P R O C E E D I N G S

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3 (Proceeding called to order, 10:01 a.m.)

4 THE COURT: Please be seated.

5 Good morning.

6 ALL COUNSEL: Good morning, Your Honor.

7 THE COURT: The case before the Court this
8 morning is Shea versus United States, Number 16-793.

9 Ms. Lipsett, you are there.

10 MS. LIPSETT: Yes, I am.

11 THE COURT: Would you please introduce yourself
12 for the record as counsel for the Plaintiff.

13 MS. LIPSETT: Yes. Linda Lipsett, counsel for
14 the Plaintiffs, and accompanied by my colleagues Daniel
15 Rosenthal, Nari Ely, and Jessie Beyderman.

16 THE COURT: All right, thank you.

17 And is that Mr. Shea, do I remember that
18 correctly?

19 MR. SHEA: Yes.

20 THE COURT: All right, thank you.

21 Mr. Kerr, would you please introduce yourself for
22 the record and your colleagues.

23 MR. KERR: Good morning. Thank you.

24 I'm David Kerr for the Department of Justice
25 representing the United States in this matter. With me

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1 at counsel table is Chris Mullins from NCIS and Mariana
2 Acevedo, also from DOJ.

3 THE COURT: All right, thank you. Welcome.

4 We do have essentially the post-trial closing
5 argument. Ms. Lipsett?

6 MS. LIPSETT: Mr. Rosenthal will make that
7 presentation.

8 THE COURT: Thank you.

9 Mr. Rosenthal, you may proceed.

10 MR. ROSENTHAL: Thank you, Your Honor.

11 I do have just a few slides I was going to use
12 over the course of the presentation if that's okay with
13 the Court.

14 THE COURT: Yes.

15 MR. ROSENTHAL: And it probably will be a little
16 while before I -- a few minutes before I get there.

17 My main goal this morning -- my primary goal is
18 to answer any questions that the Court has about the
19 briefs, which I think have thoroughly captured the
20 issues before the Court, but I'm going to give a summary
21 of our view on the issues, starting with the first
22 issue, the liability issue, whether Mr. Shea is exempt
23 from the FLSA or nonexempt.

24 So this is an issue on which the Government bears
25 the burden of proof, and they have the burden to

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1 eliminate any reasonable doubt as to whether Mr. Shea is
2 exempt. The way we look at Mr. Shea's work, it
3 basically breaks down into two main components. There's
4 his surveillance work, the basic work of sitting outside
5 of someone's home, tracking them as they move, remaining
6 discreet; and then there's the work that he performs
7 when he's the team lead. I think both parties have
8 largely looked at those -- the two main components of
9 Mr. Shea's work.

10 As to that first component, the surveillance
11 work, we think that that work is pretty clearly not
12 exempt administrative work, and this involves, as I
13 said, staking out someone's home, following them in a
14 car, watching them with a binocular or a monocular,
15 taking photos of them, and remaining discreet. We don't
16 think that that really has any connection to management
17 or general business operations of an administrative
18 worker, which, you know, are things that involve the
19 internal kind of workings or runnings of a business.

20 So -- and we think that that's what the Court
21 thought, at least at the summary judgment stage when it
22 looked at the record at that point and thought that
23 Mr. Shea's work as a line investigative specialist was
24 nonexempt. The trial record confirms that conclusion,
25 we think.

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1 So that takes us to -- it basically means that
2 the exemption question is whether his team lead work
3 makes him an exempt employee, and there are two main
4 reasons why the answer to that question is no. The
5 first one is that Mr. Shea is not a full-time team lead.
6 He's a full-time team member who sometimes serves as
7 team lead.

8 And, in fact, after we heard all the evidence at
9 the trial, including Mr. Freeman's list that he put
10 together, his testimony about that list, and the
11 testimony from Mr. Shea and Ms. Sevigny, it -- all that
12 evidence put together shows that Mr. Shea was team lead
13 on somewhere between one-fifth and one-quarter of the
14 team's missions. We put those figures forth in our
15 post-hearing -- post-trial brief, and they weren't
16 disputed by the Government in their response.

17 So just to --

18 THE COURT: Well, the Court had the impression
19 from Mr. Freeman's testimony that Mr. Shea was chosen as
20 team lead for situations that were likely to last a
21 while or were quite important to the case officers and
22 so on and so forth. Does that make a difference?
23 Because the 50 percent test doesn't have to be met
24 necessarily --

25 MR. ROSENTHAL: Sure, sure.

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1 THE COURT: -- depending on the other
2 circumstances that surround somebody's responsible
3 position.

4 MR. ROSENTHAL: Yes, Your Honor. That's correct.

5 So the 50 percent, I have a little more to say
6 about the -- kind of what the percent is, but once we --
7 once we look at that, we'll look at the OPM regulation,
8 which says that if someone spent more than 50 percent of
9 their time on exempt duties, typically they will be
10 exempt. If they spend less than 50 percent of their
11 time on their duties, then there are some specific
12 showings that the Government has to make in order to
13 show that that is the person's primary duty.

14 So one of those factors -- one of those three
15 factors does relate to time. The time doesn't
16 completely disappear from the analysis, because if
17 someone only spends, you know, an occasional amount of
18 their time on something, the law says that that is a
19 factor and that -- and as we said in our briefs, we
20 haven't found any case where any court has said that
21 someone with this percentage of time, as I'll show in
22 the next few slides, that that was a primary duty. The
23 Government hasn't cited a single case of that. So time
24 is -- always is a factor.

25 But then the second factor in that OPM test is

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1 whether that duty is the reason for the existence of the
2 position, which I take to essentially be saying this
3 duty is, you know, clearly the most important of the
4 person's duties, so important that it's really why there
5 is this position, so that someone could fulfill this
6 duty.

7 THE COURT: Well, there was a ladder of
8 progression that people testified about with these
9 particular specialists.

10 MR. ROSENTHAL: Correct.

11 THE COURT: Starting with a GS-7 and rising to a
12 GS-12, and Mr. Shea is definitely at GS-12, along with
13 Ms. Sevigny and -- and I can't remember the third
14 person's name.

15 MR. ROSENTHAL: The one who testified up here?

16 THE COURT: Yes.

17 MR. ROSENTHAL: Mr. Ester. Actually, all of the
18 investigations specialists currently, I believe, are
19 GS-12s.

20 THE COURT: All of them?

21 MR. ROSENTHAL: And the record shows that many
22 GS-12s never serve as team lead --

23 THE COURT: Ah-ha.

24 MR. ROSENTHAL: -- including -- I think the --

25 THE COURT: Does the record actually show that

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1 all of them are GS-12s at this point?

2 MR. ROSENTHAL: I believe so. I will have to
3 check that. I think there are younger members on the
4 team, such as Mr. Ester and others, who have now climbed
5 the ladder, so to speak, and they are at the GS-12
6 level. But the record is certainly clear, as we said in
7 our brief, that there have been several GS-12s who have
8 never served as team lead. So it's not something that's
9 actually required of the GS-12 position. It's something
10 that some GS-12s do.

11 So we think that that strongly suggests that
12 that's not "the reason for the existence of the
13 position." And the Government hasn't produced any
14 evidence to say what the reason for the existence of the
15 position is. They didn't, for example, produce anyone
16 from HR who could talk about why this position exists
17 and why it was created.

18 THE COURT: Let me ask a question about the
19 description of the responsibilities of Mr. Shea. Has
20 that actually been modified? There have been
21 suggestions that it would be. There was a little bit of
22 a motion practice about that. Where does that stand?

23 MR. ROSENTHAL: As far as we know, the position
24 description hasn't been updated yet.

25 THE COURT: There was a draft, and you asked for

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1 the draft. Is that correct?

2 MR. ROSENTHAL: Correct. So we -- we received --
3 we asked for that and we received from the Government
4 essentially several pages that were fully redacted, and
5 they said that it was on the basis of work product or
6 privilege. It seems like now they're focusing on work
7 product as the ground. We think that that doesn't work
8 for several reasons.

9 One is that there's really no contention on their
10 side, I don't think, that it reflects the mental
11 impressions of an attorney. So, at most, it would be
12 kind of the lower category of protection, of work
13 product, which means that we'd still have the ability to
14 have -- to be entitled to that if it was evidence that
15 was important and that we couldn't get through other
16 means.

17 And then -- but even in that lower category, we
18 don't think it fits there because, as we cited several
19 cases in our briefs, there's a test that requires a
20 certain expectation of confidentiality, that this is
21 something internal and confidential within the Defendant
22 or the party, but in this case a position description is
23 something that's disseminated widely to, you know, the
24 people in the position and others. They are not
25 confidential documents.

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1 Moreover, the Government said that it was
2 supposedly preparing this to be released after the
3 conclusion of litigation, not for use in the litigation,
4 but after the conclusion of litigation, they would
5 disseminate this publicly, for the public.

6 THE COURT: Let me ask a question about
7 comparability. Do you have the updated position
8 descriptions for the other surveillance team?

9 MR. ROSENTHAL: No.

10 THE COURT: You do not. So you can't make a
11 comparative analysis.

12 MR. ROSENTHAL: No. We --

13 THE COURT: We do know that the position
14 descriptions have been revised recently, though. Is
15 that correct?

16 MR. ROSENTHAL: The classification has been
17 changed.

18 THE COURT: The classification has been changed,
19 but that's not the question.

20 MR. ROSENTHAL: I don't know that -- right. I
21 don't -- I am not aware of any revised position
22 description for any member of the team that hasn't been
23 produced to us. One reason we think that's important is
24 because even after we sat through two days of trial and
25 heard a lot of detailed testimony about what Mr. Shea

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1 does, the Government is still, throughout its brief,
2 relying on the language of the position description to
3 define his duties at some portions of their argument,
4 and --

5 THE COURT: Well, but that's understandable given
6 the particular test, especially for the reasonable basis
7 and good faith issue in the case.

8 MR. ROSENTHAL: I think -- I think you're right,
9 it could have more applicability on that prong of it,
10 that's fair, to the extent it reflects something about
11 what the agency thought about what his duties were.

12 THE COURT: Exactly.

13 MR. ROSENTHAL: So -- but in terms of the
14 liability question, that's simply based on what he
15 actually does in his job. But my main point there is
16 that since the Government is relying on -- in part on
17 the position description, including for the good faith
18 issue, we believe that we're entitled to know whether
19 there's been an internal acknowledgment that certain
20 parts of that position description are not accurate, and
21 that may be reflected in a revised position description.

22 THE COURT: Well, we had testimony on that
23 subject, though, from Mr. Shea and Mr. Freeman. Is that
24 correct?

25 MR. ROSENTHAL: Ah, well, Mr. Shea and

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1 Mr. Freeman talked about their -- they both acknowledged
2 parts of the position description that are not, in fact,
3 accurate, that's true. But in terms of whether that's
4 been -- sort of gone up the chain within HR and NCIS, we
5 don't know that.

6 THE COURT: Well, there was discussion between
7 Mr. Shea and Mr. Freeman -- and, actually, I don't know
8 whether there was testimony, I don't recall -- regarding
9 the supervisor after Mr. Freeman left, but in any event,
10 that discussion between the two of them related to
11 overtime pay, if the Court has it correctly.

12 MR. ROSENTHAL: So Mr. Shea and Mr. Freeman, yes,
13 both -- they -- Mr. Shea brought to Mr. Freeman a
14 concern about overtime pay for the team, and Mr. Freeman
15 relayed that concern to his supervisor, the assistant
16 special agent in charge, and also to an HR-type person.

17 THE COURT: And that had to do -- just let me
18 clarify in my own mind what I think that was all about.
19 I think that had to do with -- I've always forgotten the
20 acronym, OU -- whatever it is --

21 MR. ROSENTHAL: AUO and RSO.

22 THE COURT: -- AUO and -- all right, whether or
23 not you got a certain amount of overtime pay in addition
24 to AUO if you exceeded a certain number of hours. Does
25 the Court understand that?

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1 MR. ROSENTHAL: Yes. That's basically right.
2 And Mr. Shea, he wasn't an expert on the pay system. He
3 didn't necessarily know all the terms, but what he knew
4 is that he was working a lot of hours, and he was only
5 getting this 25 percent AUO premium even though he was
6 working a lot more than 25 percent extra hours. So that
7 was essentially the concern he brought in.

8 And because he didn't know about the FLSA
9 specifically, he raised that -- referenced something
10 called "regularly scheduled overtime," which is a
11 different -- a different type of overtime that someone
12 can get in addition to AUO. But clearly both Mr. Shea
13 and Mr. Freeman thought that the team should be getting
14 more overtime pay, and they relayed that up the chain,
15 and as far as we know, NCIS took no action based on
16 that.

17 So returning to the primary duty issue, let me
18 just make a couple more comments about that, and then
19 I'll move on to the next issue. So we do have a
20 visual -- a visual depiction of -- this is the -- what
21 the record shows about how often Mr. Shea served as team
22 lead, about 19 percent of the missions, which is the
23 smaller --

24 THE COURT: Now, there was a time in 2015, if the
25 Court recalls correctly, when Mr. Shea served

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1 considerably more time. Now, you -- I was going to say
2 quibble, and that's not exactly the term -- but there's
3 a little bit of a controversy over the number of hours
4 that he served as team lead compared to the total number
5 of hours he worked in 2015.

6 MR. ROSENTHAL: Correct.

7 THE COURT: Not so much in '16 and '17 and so on.

8 MR. ROSENTHAL: Correct. So, yes, let me get to
9 that. So there are several different ways of looking at
10 it. So this one is based on number of missions. We
11 have also done it based on number of days. So this
12 shows that Mr. Shea -- 22 percent of the days when the
13 team was on a mission, he was -- he was team lead, but
14 then the Government provided a method that was based on
15 hours, so I'm going to talk about that now.

16 So -- actually, before I even get to this chart,
17 let me make a few other comments about the Government's
18 method. So what the Government basically did is they
19 looked at all the hours where Mr. Shea was on a mission
20 where he was team lead for that mission, so they added
21 up all those hours. Then they added up a certain number
22 of hours before and after each mission when he was team
23 lead and added those up. And so that sum goes on the
24 top of the fraction.

25 And then on the bottom of the fraction, they put

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1 the total number of hours that he worked in the entire
2 year, paid hours minus leave, except they got that
3 wrong. They miscounted the number of hours that he
4 worked over the course of the year. So you can see
5 that -- I don't know if you have the exhibits in front
6 of you, but if you look at Plaintiff's Exhibit 4, it is
7 the spreadsheet -- or 3 -- I'm sorry, I've got my tabs
8 mixed up. It's either 3 or 4. Oh, it's Plaintiff's
9 Exhibit 4, I'm sorry.

10 You can look at the rows that show his hours
11 and --

12 THE COURT: Well, there was a difference of five
13 or six hundred hours, at least you briefed that.

14 MR. ROSENTHAL: Right.

15 THE COURT: Is that correct?

16 MR. ROSENTHAL: Yes. So if you add these up
17 correctly, that fraction is about 37 percent. The
18 problem is, though, that at the top of that fraction,
19 they are, first of all, counting these pre- and
20 post-mission hours that are nowhere in the record
21 supported whatsoever. There's no evidence that he spent
22 40 hours before a mission doing team lead duties. In
23 fact, the only time estimate we got was Mr. Shea saying
24 it took him about ten minutes to put together a plan,
25 which is largely copied from something the case agent

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1 had filled out and then from past plans. It's kind of a
2 boilerplate.

3 So if you take all those hours out -- and we
4 didn't put this in our brief, but you can calculate it
5 from the charts -- it falls to 28 percent, and then --

6 THE COURT: Well, except that part of the
7 responsibility of the team lead is to organize the team,
8 the assistant team lead, and so on and so forth, but
9 especially to meet with the case manager or the case
10 agent, depending on --

11 MR. ROSENTHAL: Correct, yes.

12 THE COURT: -- and to sort out what's actually
13 happening. That would appear to be the critical element
14 of the entire exercise.

15 MR. ROSENTHAL: Yes, Your Honor. I agree with
16 that, but there's -- the Government didn't produce any
17 evidence of how long that takes, and --

18 THE COURT: Well, that's true, but on the other
19 hand...

20 MR. ROSENTHAL: Well, I think we could certainly
21 all agree that it probably takes at least an hour, but
22 does it take 40 hours? That's what the Government
23 assumed. That's the question, so...

24 And plus, another thing to keep in mind here is a
25 lot of these missions are repeat missions. So it's a

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1 single case where they are going out to conduct
2 surveillance multiple times on the same target. So in
3 those cases, the need for -- I would imagine the need
4 for a lot of pre-mission discussion is diminished
5 because they've already been out watching this target
6 and they have already been briefed on the case.

7 THE COURT: Well, in fact, Mr. Shea had a number
8 of those situations.

9 MR. ROSENTHAL: Yes.

10 THE COURT: The word "Mohave" sticks in my mind
11 for a whole variety of reasons, but in any event...

12 MR. ROSENTHAL: Yes. So in any event, we
13 think -- and I just -- a theme that I may return to is
14 that this is the Government's burden of proof on this
15 prong. So to the extent there's a question where
16 there's no evidence, such as how long does Shea meet
17 with the case agent, I think the Court should bear in
18 mind that it was really -- that the burden was on the
19 Government to produce that evidence.

20 So if you imagine this fraction, kind of doing
21 the math correctly and taking out those -- at least some
22 of those pre- and post-mission hours, then you get to
23 the question of those hours when Mr. Shea was on a
24 mission and he was the team lead. Are we going to count
25 all of those hours towards his team lead work or are we

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1 only going to count some of them?

2 The Government says you count all of them, but
3 the testimony is not disputed that a lot of that time,
4 Mr. Shea is doing the basic surveillance work. He's,
5 you know, using his camera or using his monocular or
6 he's following someone or he's simply trying to remain
7 discreet. And, in fact, it's undisputed that about 90
8 percent of his time is on those sorts of things.

9 So this is a -- this chart is kind of a visual
10 depiction of that. The large blue area, the 71.9
11 percent, that's the percentage of hours that have no
12 connection whatsoever to team lead work unless you are
13 going to attribute some of these pre- and post-mission
14 hours.

15 And then the two smaller slices of the pie are
16 hours on a mission in which he was the team lead. The
17 Government attributes the entirety of both of those
18 slices to the team lead role. We attribute just 10
19 percent based on the undisputed testimony of Mr. Shea
20 and Ms. Sevigny, so that's the small slice.

21 But the real reason that I wanted to show this is
22 because of what it looks like for 2016 and '17. So in
23 2016, those two small slices which the Government says
24 are all attributable to the team lead role are really
25 only 10 or 11 percent, and the portion that's truly

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1 attributable to the team lead role is just 1 percent in
2 our view.

3 And then in 2017, it's even more stark. So all
4 the hours attributable to missions on which Mr. Shea is
5 team lead are only about 7 percent, and then we would
6 say the team lead portion is just that tiny little
7 sliver of 0.7 percent. So that 0.7 percent, in our
8 view, in 2017, is the only time that the record actually
9 shows Mr. Shea spent on team lead duties in that year.

10 But there's -- we have another argument which is
11 equally important in our view, which is that even if
12 Mr. Shea spent all of his time as team lead, he still
13 wouldn't be an exempt administrative employee, and we
14 say that based on a line of cases and regulations which
15 say that when an employee is out doing field work in an
16 area related to investigations, surveillance, or other
17 things, such as firefighting or EMS, the fact that that
18 person is sort of a supervisor directing people doesn't
19 make them an exempt employee.

20 And there is a Department of Labor regulation
21 which is -- we think is quite clear on this point, which
22 we have cited, which says someone who performs
23 surveillance, even if they're directing other employees
24 in the field, they're not an exempt administrator.

25 THE COURT: Now, that's the first responder

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1 regulation, or at least it's popularly known as that.

2 Is that correct?

3 MR. ROSENTHAL: Correct.

4 THE COURT: And Mr. Shea actually does not have
5 law enforcement responsibilities or powers. He can't
6 make an arrest.

7 MR. ROSENTHAL: Well, that's true. Yes.

8 THE COURT: We had testimony on that subject,
9 right?

10 MR. ROSENTHAL: Yes.

11 THE COURT: Does that make a difference? Does
12 it -- he's really not a first responder at all. He's
13 somebody -- and, indeed, he indicated most of his work
14 deals with national security surveillance rather than
15 criminal surveillance.

16 MR. ROSENTHAL: That's correct, Your Honor. The
17 term "first responder" --

18 THE COURT: Does that make a difference?

19 MR. ROSENTHAL: We don't -- we don't think so.
20 The term "first responder" doesn't appear anywhere in
21 that regulation.

22 THE COURT: It does not.

23 MR. ROSENTHAL: It does not. That is a label
24 some people have used because many of the duties within
25 the regulation are first response type duties, but the

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1 regulation does not use that term, and it lists a number
2 of duties that are not traditional first response duties
3 within that, including, explicitly, performing
4 surveillance. That's one of the duties that's listed.

5 So the simple text of the regulation we think
6 says that whether or not it's a first responder doesn't
7 really matter, but the thing that makes an employee in
8 that type of position exempt, despite the first
9 responder regulation, is when the employee does sort of
10 managerial or supervisory things outside the field that
11 are not related to the particular missions.

12 THE COURT: Now, that goes to the position
13 description. Is that correct?

14 MR. ROSENTHAL: Ah, well, I suppose there
15 might -- there may be some phrases in the position
16 description that arguably fall in that category, but
17 there's -- such as there's one in there about, you know,
18 preparing reports, about analyses of the team, something
19 like that, but they haven't showed that Mr. Shea doesn't
20 do that.

21 And moreover, there's no time percentage
22 associated with that in the position description,
23 which -- and I am going to get to this in a moment, but
24 it's -- basically, as Ms. Cruz herself admitted, in
25 order to use something like that, to deem someone

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1 exempt, you really need to know how much time they spend
2 on it. If it's something they do once a year for a
3 couple hours, that's not going to cut it. So NCIS
4 actually knows, because Ms. Cruz told us, that you need
5 that type of information to assess a position, and it's
6 not -- it's not there in the position description.

7 But I just do want to mention, so that we're
8 clear, we're not saying that anyone who does any
9 surveillance is -- is nonexempt. The question, again,
10 is whether they have managerial or supervisory duties
11 that are not connected with their field work, and the
12 Benavides case is a perfect example of that.

13 THE COURT: Well, Mr. Freeman went out on a
14 couple of missions himself.

15 MR. ROSENTHAL: Mr. Freeman would be a perfect
16 example of that. So Mr. Freeman is the type of employee
17 who, although he did do some field work -- and, in fact,
18 the current supervisor, Mr. Cooper, does even more than
19 Mr. Freeman, he's almost always in the field, was the
20 testimony -- but those roles do involve other duties
21 outside the field that are supervisory, which may
22 involve performance evaluations, hiring, those sort of
23 things.

24 So in our view, because there's no evidence that
25 Mr. Shea does anything like that, even if he was always

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1 team lead, he would not be an exempt employee, and we
2 have -- I think it's almost like the litany of cases
3 that we've cited in almost every one of our submissions
4 that I won't go through again, but they are basically
5 all cases where people had essentially team lead type
6 jobs, they were directing others in the field, and, in
7 fact, in the Morrison case, they were station and shift
8 commanders who were kind of the fourth level up within
9 the hierarchy. They had three whole kind of layers of
10 employees below them, and they were found nonexempt
11 because all of their -- at least the vast majority of
12 their more managerial type duties were all done in the
13 field in the course of, you know, nonexempt work.

14 So that's essentially what I have to say --

15 THE COURT: Is the Morrison case the fire
16 captains or the police sergeants?

17 MR. ROSENTHAL: There is -- Mullins is the police
18 sergeants --

19 THE COURT: Mullins, I'm sorry. That's what I
20 was thinking of.

21 MR. ROSENTHAL: Yes.

22 THE COURT: All right, thank you.

23 MR. ROSENTHAL: So that's essentially our case on
24 the liability issue, and if the Court has no other
25 questions on that, I will move on to the --

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1 THE COURT: No. I'm sorry I asked so many
2 questions, but go ahead.

3 MR. ROSENTHAL: I appreciate knowing what Your
4 Honor is interested in hearing about so I don't just say
5 things you're not interested in hearing about.

6 So let's talk about the liquidated damages issue.
7 So this is another issue on which the Government has the
8 burden of proof, and the cases say that this is "a
9 difficult burden" and that it's really the unusual case
10 in which, under the FLSA, in which only single damages
11 are awarded. The kind of typical case is double
12 damages.

13 In order to avoid that result, there are two
14 prongs the Government has to show. There's the good
15 faith prong and the reasonable grounds prong. Those are
16 analyzed separately. One of them is essentially a
17 subjective test and one of them is an objective test.

18 So the good faith prong, which is the subjective
19 component, is based on whether the employer took "active
20 steps" to ascertain the dictates of the FLSA and act to
21 comply with them, and the Government had the burden to
22 show that they did that.

23 So in their brief, they attempt to do that by --
24 there's only one thing that they are able to point to as
25 a step they took, which is that the supervisor

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1 supposedly did an annual review of the position
2 description, which I think you've alluded to a couple
3 times. So we think that that -- there are two reasons
4 why that doesn't get them over -- over their burden.

5 The first is that that review of the position
6 description, it may be a review of the -- what the
7 employee does, but it's not a review of whether the
8 agency is complying with the FLSA. Those are two
9 separate issues. And we know that those are separate
10 because Ms. Cruz testified to that. This is testimony
11 from Ms. Cruz. We asked her (as read):

12 "QUESTION: That annual review process is not a
13 process to review whether the FLSA classification is
14 correct.

15 "ANSWER: Correct.

16 "QUESTION: It's just to review the accuracy of
17 the position description.

18 "ANSWER: The supervisor is not asked to review
19 the FLSA classification."

20 THE COURT: Well, the supervisor probably is not
21 expert in the FLSA classification anyway. HR would be.

22 MR. ROSENTHAL: Correct.

23 THE COURT: That's why Ms. Cruz testified.

24 MR. ROSENTHAL: Absolutely. And if you look at
25 the Abbey case, which we cited, that was a case where

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1 the Court of Claims found a lack of good faith and
2 reasonable grounds because the person who was
3 responsible for doing a check was not trained in the
4 FLSA, did not consult anyone who was an expert on the
5 FLSA. So it's really not possible for anything the
6 supervisor may have done to satisfy NCIS's obligation to
7 check its compliance.

8 THE COURT: Well, except that the position
9 description -- which if the Court recalls correctly was
10 adopted in 2007, along with the classification, or
11 roughly contemporaneously, at least -- was still in
12 place. That's part of the problem in this case.

13 MR. ROSENTHAL: Well, that's -- that's absolutely
14 true, Your Honor, which brings me to another key point,
15 which is that under a number of cases which we have
16 cited, it's not enough to say we've had this policy in
17 place for a long time, and, you know, it hasn't been
18 challenged, so, therefore, we're entitled to rely on it.
19 Courts have rejected that.

20 It's not okay for an employer to simply say, you
21 know, since we've had this policy for a while, we're
22 going to continue relying on it, and that's especially
23 true -- especially true -- when the employer doesn't
24 actually know really any information about how or why
25 that original classification was made. This is the

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1 second excerpt from Ms. Cruz's testimony that I wanted
2 to draw the Court's attention to.

3 Ms. Cruz testified that she does not know which
4 exemption was used. That's the first two questions
5 there. She doesn't know if it was the administrative
6 exemption, for example. She does not know what
7 reasoning NCIS went through, and that's the question
8 that begins on line 20. She does not know what process
9 they went through.

10 And then on the top of the next page, they do not
11 know -- she does not know if they even considered
12 regulations in making that determination. So we have no
13 evidence that would allow the Court to conclude that
14 that original classification was done in compliance with
15 the FLSA, and we have no evidence to allow the Court to
16 conclude that at any time after that original
17 classification, NCIS ever, you know, took a look at that
18 or even thought about it, other than this supposed
19 annual review of the position description.

20 The other problem with that annual review, by the
21 way, is that Mr. Freeman said on cross examination that
22 he didn't do it; he wasn't involved in it. So his
23 testimony is unclear at best as to whether this process
24 took place at all. And Ms. Cruz did -- just to
25 re-affirm a point I made earlier, Ms. Cruz did testify

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1 directly that, as far as she knows, there was no
2 re-assessment of the classification from 2007 up until
3 we filed the lawsuit.

4 So what all of this amounts to, basically, is a
5 conspicuous absence of evidence of any efforts that NCIS
6 took to check whether it was actually compliant with the
7 FLSA with respect to this position, but that absence of
8 evidence is then compounded by a presence of a lot of
9 evidence that NCIS actually wasn't applying the FLSA
10 correctly, and that starts with violations of the FLSA
11 that were shown at the trial.

12 So Mr. Ester testified that as an entry-level
13 GS-7 investigations specialist, he was classified as
14 exempt from the FLSA. He was, you know, still shadowing
15 other employees. He was making forty-some thousand
16 dollars a year at that time. And Ms. Cruz told us on
17 the stand that that was -- that it wouldn't be proper to
18 categorize a GS-7 investigations specialist as exempt.

19 So one thing that we know for sure from this
20 record is that at least one point in the past, NCIS
21 did admittedly misclassify one of the investigations
22 specialists. We don't know how widespread that was, you
23 know, we might surmise that probably that wasn't
24 specific to Mr. Ester, but we don't know for sure.

25 Then Mr. Ester testified that at some point he

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1 was changed to nonexempt, but even at that time he
2 wasn't actually paid like a nonexempt employee. He only
3 continued getting that AUO premium, not the extra
4 overtime. So that's clear in the record.

5 And then on top of that, we put, in an appendix
6 to our brief, some public documents from OPM of which
7 the Court may take judicial notice, which show that OPM
8 found other violations of the FLSA committed by NCIS,
9 and those were criminal investigators. Ms. Cruz told us
10 on the stand that she wasn't really familiar with those
11 cases, which was somewhat surprising since she's the
12 head of classification, but the Court can take judicial
13 notice of them because they're government public
14 documents. So those -- and those were three different
15 cases. So that amounts to some significant evidence
16 that NCIS was actually admittedly violating the FLSA.

17 And then we had Ms. Cruz's attempts to try to
18 explain NCIS's processes for FLSA classification, and
19 those also show that NCIS was not reasonably
20 implementing the FLSA. So the first portion of
21 Ms. Cruz's testimony that I wanted to point to was --
22 so, she testified -- Ms. Cruz testified on the first day
23 of the trial and the second, because her testimony was
24 interrupted, and this was some of her testimony from the
25 first day of the trial, in which she said that

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1 Mr. Shea's performance of production work tied to
2 criminal investigations supported the decision to
3 classify him as exempt, she agreed with that, and she
4 re-affirmed it when asked if she was -- if she was sort
5 of sticking with that testimony.

6 But then the next day I basically posed the same
7 question to her (as read):

8 "QUESTION: Do you believe that if an employee
9 performs work directly related to criminal and
10 counterintelligence investigations, that production
11 function at NCIS, that would support finding that
12 employee exempt?

13 "ANSWER: No."

14 And she -- I asked her:

15 "QUESTION: Do you remember that during the
16 deposition, you actually said that did support finding
17 Mr. Shea exempt?"

18 She agreed.

19 And I asked her:

20 "QUESTION: So you understand that was not a
21 correct statement."

22 And she agreed.

23 So we have the head of classification of this
24 agency who appears to be confused about a pretty basic
25 principle of how the FLSA works. She further,

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1 similarly, testified -- we asked her (as read):

2 "QUESTION: Do you believe that law enforcement
3 has general business operations?"

4 She said yes.

5 "QUESTION: So according to NCIS's practices, if
6 an employee is doing law enforcement, that would support
7 the exempt classification?

8 "ANSWER: Correct.

9 "QUESTION: But in those OPM decisions we spoke
10 about, the criminal investigators were found nonexempt.

11 "ANSWER: Yes, they were."

12 So, again, Ms. Cruz -- with all respect to
13 Ms. Cruz, her grasp of some of the basics of FLSA
14 classification didn't seem to be exhibited during her
15 testimony.

16 And then the last point I wanted to mention about
17 Ms. Cruz's testimony is that she -- in her own kind of
18 review of the position, which she did after we filed the
19 lawsuit, she only looked at the position description.
20 This relates to some of the Court's questions about the
21 position description. But she -- when we asked her (as
22 read):

23 "QUESTION: Did you actually do anything else to
24 verify whether the position actually did any of those
25 things?"

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1 She said no.

2 Then:

3 "QUESTION: Did you ask anyone how much time the
4 employee spent on those various things?"

5 She said no.

6 So it really was only, in isolation, the position
7 description. And in some of her other testimony that
8 she gave, she acknowledged -- I asked her (as read):

9 "QUESTION: In order to do classification, you
10 have to know how much time the employee spends on their
11 duties.

12 "ANSWER: Yes, we do require that.

13 "QUESTION: That's a necessity given the
14 regulations that are in place."

15 And she agreed.

16 So she understood that it is not possible, under
17 the FLSA, to classify a position based solely on a
18 position description that has no information at all
19 about how much time the employee spends on different
20 duties, because then you just don't know which duties
21 are the most important duties to that -- to that
22 position.

23 The next piece of evidence I wanted to talk
24 about, which we have already talked about, is the
25 complaints that were raised about overtime pay for this

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1 team. So in our view those should have, at the very
2 least, given NCIS some reason to look into its
3 compliance, although it already had had that obligation
4 under the FLSA.

5 And then the last piece of evidence that I wanted
6 to mention is the reclassification of the position. So
7 I think we and the Government have different views on
8 whether the Court can consider that, how the Court can
9 consider it, but in our view, at a very minimum, even if
10 it doesn't go to the liability issue, it does go to the
11 damages question, which relates to NCIS's state of mind
12 and the reasonableness of its actions, and we think the
13 Court can look at that reclassification and say that
14 NCIS was capable of determining that at least some
15 members of this position should be nonexempt. The last
16 business day before trial, they changed everyone to
17 nonexempt, including Mr. Shea, and I think that does say
18 something about their state of mind and their
19 reasonableness in applying the FLSA.

20 So that concludes my discussion of the liquidated
21 damages issue. The last two issues relate to the
22 methodology for calculating damage and also the
23 willfulness issue, and I think I'll largely rest on our
24 briefs for those, but I can -- I'll give a quick summary
25 and answer any questions that the Court has.

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1 So on the damages methodology, what we're
2 suggesting to the Court is that it look at -- look at
3 Mr. Shea's hours and his rate of pay and calculate what
4 he would have earned on time and a half for his overtime
5 hours and then subtract from that what he actually
6 earned under the AUO system. So it's a pretty
7 straightforward calculation.

8 There is a different method that the Government
9 relies on, which is the method you use for an employee
10 who's both on AUO and getting FLSA overtime, and that's
11 a somewhat complicated formula that I can talk through,
12 but that's the method they rely on.

13 We believe that doesn't apply here because the
14 testimony shows that NCIS doesn't actually pay --
15 doesn't actually follow that formula, because if someone
16 is put on AUO -- I'm sorry, if someone is put on FLSA,
17 they take them off AUO. So, in other words, if Mr. Shea
18 had been correctly classified in our view, he would have
19 been taken off AUO, and then he just would have been
20 getting that time and a half amount for his overtime
21 hours. So that's why we think the Court should not
22 apply the other method.

23 And then the willfulness issue is largely
24 captured by what I've already said about the good faith
25 and liquidated damages in terms of NCIS's past

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1 violations, its -- the testimony from its head of
2 classification, its failure to check its compliance, and
3 its reclassification of the position.

4 So unless the Court has any other questions, we
5 believe that, based on the record and the arguments that
6 we've submitted, that the Court should find Mr. Shea not
7 exempt and award him damages and liquidated damages and
8 also rule for us on the other issues that we've raised.

9 THE COURT: All right. Thank you, Mr. Rosenthal.

10 Mr. Kerr?

11 MR. KERR: Thank you, Your Honor.

12 Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. KERR: May it please the Court.

15 As a senior level investigations specialist,
16 Mr. Shea helps lead the special surveillance team at
17 NCIS. Mr. Shea shows other team members how to use
18 technical gear. He checks to make sure that the other
19 members of the team are maintaining their gear and, if
20 necessary, that they are getting it repaired or
21 replaced.

22 Mr. Shea's supervisor, Mr. Freeman, testified
23 that Mr. Shea answers questions from junior team members
24 about surveillance tactics, about operations, about
25 technical equipment, and about general administrative

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1 functions from the special surveillance team or NCIS.

2 As a senior level investigations specialist,

3 Mr. Shea also serves as team lead on a rotational basis.

4 According to the position description for investigations

5 specialists, the team leads are responsible for

6 directing all aspects of the surveillance operation.

7 The evidence introduced at trial supports this

8 description.

9 Mr. Shea asserts that he does not direct
10 surveillance, but Mr. Shea testified that when serving
11 as team lead, he doesn't have the luxury to sit back
12 somewhere to direct the team. He's also performing
13 surveillance. The fact that he's also performing
14 surveillance, however, does not change the fact that
15 he's directing the team during the surveillance
16 operation.

17 Mr. Shea testified that, as team lead, if he
18 thinks a team member is in the wrong position, he will
19 ask them to move. The team lead is responsible for
20 making sure all team members are in the right position
21 for the entire mission. Even if Mr. Shea's experience
22 shows him that they usually are there themselves, he's
23 responsible for making sure they get there.

24 Mr. Shea also testified that as team lead, you're
25 not going to let someone on your team follow someone

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1 that hasn't been designated as a target. The team lead
2 is responsible for making sure the team is following the
3 rules and procedures during the entire mission, even if
4 in Mr. Shea's experience they are following the rules
5 and procedures.

6 Mr. Shea testified that during surveillance
7 missions, there are always going to be disagreements and
8 personality conflicts. The team lead is responsible for
9 resolving these disagreements and conflicts and keeping
10 everyone focused on the mission at all times.

11 Mr. Freeman testified that Mr. Shea is a good
12 team lead because he never raises his voice. He remains
13 calm even in situations where Mr. Freeman would have
14 lost his mind. Mr. Shea has a very democratic method,
15 Mr. Freeman said, but he still kept control, and someone
16 on the team has to keep control; someone has to be in
17 charge.

18 When the team conducts a surveillance operation,
19 there are a lot of moving pieces. There are different
20 personalities, and, of course, there are the mission
21 objectives. The team goes on surveillance operations
22 all over the United States. Some of them last for weeks
23 or even months.

24 In 2015, the team was out in the field
25 approximately 70 percent of the team; 50 to 60 percent

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1 of the time in 2016; and in 2017, 40 to 50 percent of
2 the time. The supervisor does not usually travel with
3 the team. On surveillance missions, therefore, the team
4 lead is the officer in charge. Mr. Shea's work leading
5 the team is, thus, nonmanual work directly related to
6 management or general operations of NCIS.

7 Mr. Shea also exercises discretion and
8 independent judgment on matters of significance. With
9 minimal supervision, Mr. Shea determines how to execute
10 surveillance operations. He decides whether team
11 members have put themselves in the best positions. If a
12 surveillance method is not working, Mr. Shea decides on
13 the course of action after comparing and evaluating
14 various options. He has to determine whether the points
15 of observation are remaining discreet and that they
16 haven't been compromised or burned. Such decisions
17 might be second nature to Mr. Shea, but he is
18 nonetheless making a judgment call; he's exercising
19 discretion.

20 THE COURT: One thing we didn't have testimony
21 about is what happens when something unusual happens
22 during a surveillance. We had testimony, if the Court
23 recalls correctly, that the team lead would check in
24 with the case agent at least once a day, but some things
25 have to happen that are a little unusual, and one would

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1 think that that would occur more than once a day. Then
2 the question is, what would happen? We didn't have any
3 testimony about that.

4 MR. KERR: Well, there was testimony about the
5 unusual event where the subject is leaving town or where
6 possibly a new target, potential target, has --

7 THE COURT: That raised the latter question that
8 the Court had, because you could have a situation where
9 there was an emerging other individual who might be
10 quite relevant to whatever the team was doing, and the
11 Court really wasn't cognizant or wasn't told what
12 happens in that circumstance, what the team lead's
13 responsibilities were with the case agent.

14 MR. KERR: Well, in those extreme circumstances,
15 I think the testimony was that the team lead would call
16 the case agent.

17 THE COURT: Right.

18 MR. KERR: But in other circumstances where the
19 target is just moving around, the team moves with the
20 target, and it's up to the team lead to direct the team,
21 to --

22 THE COURT: Well, there are obviously rules of
23 surveillance, and this situation with another target
24 emerging might be outside the rules of surveillance or
25 it might be covered by it. The Court doesn't need to

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1 know what those rules are, but it's just -- that has to
2 do with the team lead's function with respect to the
3 case agent.

4 MR. KERR: I understand, Your Honor.

5 Even as a team member, Mr. Shea's deciding how
6 closely to follow someone, whether to follow someone
7 into a store, and he's managing his heat state.

8 Mr. Shea asserts that the evidence shows only that all
9 team members are free from supervision. We agree with
10 the latter point of this. The type of surveillance
11 performed by the team is not simply watching a drug buy,
12 where the only discussion might be when to move in for
13 the arrest. It is complicated and requires experience,
14 analysis, and discretion from all team members.

15 As team members move up the ladder and take on
16 more responsibilities of leading the team, this requires
17 even more experience, analysis, and discretion.

18 Mr. Shea asserts he spends no more than 3 percent of his
19 team leading the team. The evidence does not support
20 this figure.

21 Because of his senior level, NCIS relies on him
22 to impart his expertise and his knowledge to junior team
23 members on an ongoing basis. Indeed, Mr. Shea is of
24 such a senior level that other members serving as team
25 lead ask him for help. There's a running joke that

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1 Mr. Shea actually is the one serving as team lead when
2 other team members have been assigned the role.

3 Mr. Freeman testified that in 2015 and 2016,
4 Mr. Shea spent about 50 percent of his time as team
5 lead. In our brief, we tried to use an alternative
6 method to show that Mr. Shea spends 50 percent of his
7 time, but regrettably, as Mr. Shea points out, it looks
8 like we subtracted some of his leave hours out twice.
9 That method, however, still reveals that he spent up to
10 38 percent of his time.

11 Mr. Freeman's testimony of 50 percent of his time
12 is based on Mr. Freeman's own experience serving as his
13 supervisor. The evidence shows that he kept track of
14 the duties on a white board, which, of course, is wiped
15 off at the end of a mission.

16 The team lead is responsible for the mission for
17 the whole duration of the mission, from the time he or
18 she is assigned to when the final report is submitted.
19 In the office before the mission, the team lead is
20 responsible for getting the team ready and making sure
21 that the equipment is ready. Mr. Shea asserts that not
22 all the time in the office is spent preparing, but he
23 doesn't dispute that the team lead is responsible during
24 that time for making sure the team and the equipment are
25 ready for the surveillance operation.

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1 Just like the six months in advance of trial in
2 this case, Mr. Shea's counsel was responsible for making
3 sure her team was ready, making sure none of them had
4 issues at home that would distract them from the trial
5 or maybe changing the trial to adjust to any changes in
6 the case.

7 Mr. Shea's duty as team lead qualified at least
8 as an alternative primary duty under the OPM test.
9 First, spending up to 40 percent of his team as team
10 lead constitutes a substantial part of his work.
11 Second, the position description states that senior
12 investigations specialists will serve as team lead on a
13 rotational basis. This is evidence that the position
14 exists to train people as they move up the ladder so
15 that eventually they will have people who can serve as
16 team lead.

17 Mr. Shea points out that not all investigations
18 specialists serve as team lead, which is true, but that
19 just shows some decide not to climb the ladder to the
20 very top. Some team members are content just performing
21 surveillance. The evidence shows, however, that without
22 a team lead, the team could not function in the field.

23 Mr. Freeman, for example, testified that the team
24 lead makes sure that all the moving parts are landing
25 where they need to land, are moving in the way they need

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1 to move, that people get to where they need to be to do
2 the job they need to do. NCIS needs senior
3 investigations specialists like Mr. Shea to lead the
4 team.

5 Third, directing all aspects of a surveillance
6 operation is clearly exempt work. The OPM test for the
7 alternative primary duty is satisfied. The evidence
8 thus shows that Mr. Shea qualifies for the
9 administrative exemption. His primary duty is to assist
10 the team in the field. Therefore, the Department of
11 Labor regulation, the first responder regulation about
12 firemen, police officers, and other employees, does not
13 apply. That regulation on its face applies when the
14 primary duty is to investigate crime, to fight fires, or
15 to conduct surveillance.

16 We ask the Court, therefore, to enter judgment in
17 favor of the United States. However, even if the Court
18 decides that Mr. Shea does not qualify, based on
19 Mr. Shea's autonomy and responsibilities as team lead,
20 NCIS's decision to classify him as exempt was
21 reasonable. NCIS relied on the position description to
22 maintain the FLSA exemption and then relied on an annual
23 confirmation from his supervisor that Mr. Shea was doing
24 the work that it describes. This is consistent with the
25 Office of Personnel Management regulation.

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1 The classification of the GS team member as
2 exempt was an administrative mistake. It was corrected
3 when he moved up to GS-9. At trial, Ms. Cruz reviewed
4 the position description and indicated that the exempt
5 classification was still correct today for Mr. Shea.
6 The description does not have time broken off, as
7 Mr. Shea's counsel pointed out, but it does have a
8 common theme of managing the collection and assessment
9 of information, of planning and scheduling and
10 coordinating logistics and operational aspects --

11 THE COURT: What does the Court do with the fact
12 that the position description and the classification
13 occurred under a different legal regime, in essence, in
14 2007? As the Court understands it, they didn't
15 necessarily apply the same criteria that they would if
16 they were doing it afresh today with these, for example,
17 recitations of particular percentages of time and that
18 sort of thing. It had more to do with functions.

19 MR. KERR: Well, Your Honor, as Mr. -- sorry, as
20 Ms. Cruz testified, the position description has a --
21 has a common theme. So the fact that it's not broken
22 down in different hours of time, it's the overall
23 character of the position and the overall character of
24 the duties which is consistent with the regulations,
25 which say the Court looked at the overall job as opposed

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1 to the specific duties.

2 THE COURT: Well, the Court seemed to recall that
3 the position description and the classification were
4 developed under a specific regime that DOD had, and then
5 they -- and that kind of carried over into the current
6 situation. Does the Court remember that correctly?

7 MR. KERR: That's correct, Your Honor, but there
8 was no -- there was no effort to go back or no duty to
9 go back and to correct all the position descriptions.
10 It was a matter of, going forward, they would use the
11 new position descriptions.

12 THE COURT: Right.

13 MR. KERR: And with regard to the position
14 description, there has been no changes to Mr. Shea's
15 position description. A draft was produced under
16 instruction from counsel in anticipation of possibly
17 settling this case. NCIS never necessarily intended
18 that it would become public, and, in fact, they hoped
19 that it wouldn't become public, depending on the outcome
20 of the settlement negotiations and the outcome of the
21 Court's decision.

22 THE COURT: Well, other people on the
23 surveillance team have been reclassified, and have their
24 position descriptions changed and are those changed --
25 if so, are those changed position descriptions

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1 available?

2 MR. KERR: No. No position descriptions have
3 been changed.

4 THE COURT: All right, thank you.

5 MR. KERR: There have been drafts, but there has
6 been no official -- there has been no release of the
7 information thus far.

8 THE COURT: All right, thank you.

9 MR. KERR: Also, if the Court awards Mr. Shea
10 back pay, the Office of Personnel Management has
11 developed a method for calculating FLSA payments for
12 nonexempt employees who also receive administratively
13 uncontrolled overtime. While at NCIS usually nonexempt
14 employees do not qualify for administratively
15 uncontrolled overtime, the fact is that Mr. Shea, if he
16 receives back pay, will be in this position of having
17 received AUO and now receiving FLSA overtime, and the
18 method developed by the Office of Personnel Management
19 for such employees should be applied.

20 I have nothing further, Your Honor. Thank you.

21 THE COURT: All right. Thank you, Mr. Kerr.

22 Mr. Rosenthal, do you have something?

23 MR. KERR: Your Honor, if I may --

24 THE COURT: Yes?

25 MR. KERR: -- the Government would like to

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1 request copies of the slides so that we have them.

2 THE COURT: All right.

3 Mr. Rosenthal, can you provide copies?

4 MR. ROSENTHAL: Yes, I can.

5 THE COURT: Thank you.

6 MR. ROSENTHAL: Can I wait until -- do you want
7 them right now?

8 MR. KERR: At some point.

9 MR. ROSENTHAL: Okay.

10 Okay.

11 THE COURT: Yes, please.

12 MR. ROSENTHAL: And we have enough copies for the
13 Court as well, so -- if the Court wants them.

14 I have a few additional comments. One is, in
15 terms of the question that the Court asked to opposing
16 counsel about unusual circumstances on a mission, there
17 was -- I agree that there wasn't a lot of information
18 about that in the record. We did just now identify one
19 relevant portion, which is on page 194, beginning at
20 line 15. This was during Mr. Shea's examination. He
21 was asked (as read):

22 "QUESTION: What happens if something unusual
23 happens during a mission? How do you handle it?

24 He said:

25 "ANSWER: We've had missions where -- where it

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1 is -- something has evolved and you need direction from
2 the case agent. So you have their phone number, their
3 cell phone number, or means to contact them. So if I
4 call the case agent and I don't get a response, then my
5 next call is to my supervisor."

6 So basically the record suggests that if there is
7 something outside the procedures, that Mr. Shea would
8 either -- would attempt to contact the case agent or the
9 supervisor, one or the other.

10 THE COURT: Well, or outside expectations or
11 sufficiently outside expectations that it was unusual,
12 those things have to happen.

13 MR. ROSENTHAL: Right. Yes, I agree with that,
14 Your Honor. And I also agree with -- I think the
15 exchange which elucidated that a great number of things
16 that could happen are covered by the basic procedures in
17 terms of -- and Mr. Shea kind of illustrated this with a
18 chart. If the target moves -- it looks kind of like a
19 football play or something, but if a target moves here,
20 we're going to move here.

21 THE COURT: So zone defense.

22 MR. ROSENTHAL: Exactly. So there are pretty
23 established procedures, and the testimony shows they go
24 through training and they get these procedures ingrained
25 into them, and they basically implement those on a -- on

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1 somewhat a rote basis.

2 Mr. Kerr said this involves analysis and
3 discretion, but there's -- I don't believe that there's
4 any testimony in the record that there's a process of
5 analysis. I think the team reacts to what they see
6 based on their training and based on their procedures
7 that they have learned.

8 And we cited a regulation which the Government
9 hasn't commented on which says that an employee who
10 exercises skill but does so in the course of
11 implementing kind of well-defined procedures does not
12 have the adequate discretion that the test requires.

13 And, of course, discretion is only one element of
14 the test. So even if the Court were to disagree with
15 that and find that Mr. Shea, as team member or team
16 lead, is doing a lot of analysis, making a lot of
17 decisions, that's not enough to find him exempt because
18 you also have the management or general business
19 operations prong, which in our view is really the most
20 important one.

21 A lot of what Mr. Kerr said is I think belied by
22 a closer examination of the record in terms of how often
23 Mr. Shea serves as team lead and what he does as team
24 lead, and so we think that that -- it's easy to -- in an
25 abstract way to kind of inflate what this role means,

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1 but when you look at what actually happens in the field
2 from Mr. Shea's testimony, it's, you know, following the
3 procedures. He said on rare occasions there's maybe a
4 gap where someone should be but isn't, and he will tell
5 the person to go there, but it's pretty straightforward
6 stuff, and all of that only relates to the time when he
7 is team lead, which is by far a minority of his time.

8 Moreover, the Government's not saying anything to
9 distinguish, based on the facts, those cases that we
10 talked about earlier, Mullins, Morrison, et cetera.
11 They're really right on point to this case.

12 The other -- the other question the Court asked
13 about the fact that the position was classified under a
14 prior system, I -- I just want to observe there. First
15 of all, I don't -- it's not so much the legal -- that
16 OPM's requirements changed, I don't think. It's that
17 the kind of HR system changed in order to better comply
18 with OPM's requirements.

19 But we would argue that at that point maybe the
20 Government -- maybe the Government didn't have an
21 immediate obligation to convert all the positions, but
22 this was a -- I believe the testimony was that the
23 change occurred in 2010. So for a period of now seven,
24 eight, nine years, NCIS never revisited this, even
25 though they knew that that position description lacked

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1 the information that you need for an FLSA
2 classification.

3 THE COURT: Was the prior method and position --
4 in dealing with position descriptions and
5 classifications peculiar to the Department of Defense?

6 MR. ROSENTHAL: I don't know the answer to that,
7 Your Honor.

8 THE COURT: Okay.

9 MR. ROSENTHAL: So we think that if you -- in a
10 sense, it's sort of an odd situation in which the
11 liquidated damages question is actually an easier
12 question than the main liability question, I would say,
13 because we really just have no evidence at all that NCIS
14 took any active steps to check whether this -- they were
15 complying, and then on top of that the other violations
16 that we've heard about.

17 So we would ask the Court once again to find for
18 Mr. Shea on all of the disputed issues, and we thank the
19 Court.

20 THE COURT: All right. Thank you, Mr. Rosenthal.

21 Mr. Kerr?

22 MR. KERR: Your Honor, two quick points.

23 THE COURT: Yes, please.

24 MR. KERR: If you go to the Mullins and Morrison
25 cases, as we say in our brief, these are distinguishable

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1 because the primary duties in those cases were law
2 enforcement or firefighting or, in this case, you know,
3 the equivalent would be performing surveillance. Our
4 position is that that's not Mr. Shea's primary duty. So
5 those cases and the DOL regulation are both
6 distinguishable and not applicable.

7 And also I would just like to put on the record
8 an objection that the slides, you know, have a lot of
9 math and a lot of percentages, but they don't show where
10 they come from.

11 THE COURT: Right.

12 MR. KERR: So I would just like to put that
13 objection on the record.

14 THE COURT: They are not evidence.

15 MR. KERR: I understand, Your Honor.

16 THE COURT: They are not even a demonstrative.

17 MR. KERR: I wasn't sure if they counted as a
18 demonstrative.

19 THE COURT: Okay, all right.

20 MR. KERR: I put that objection on the record.
21 Thank you, Your Honor.

22 THE COURT: Okay, thank you.

23 And, Mr. Rosenthal, if you would make sure that
24 the Clerk has -- oh, would you, please?

25 MR. ROSENTHAL: Yes. And I would just note, all

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1 the figures come from the appendices to our briefs,
2 Appendix A and B.

3 THE COURT: I was going to say, the numbers are
4 in the briefs, actually. So we can cope with that.

5 Well, this is a fascinating case. I actually
6 watched NCIS once, so -- otherwise, I wouldn't -- but it
7 was a little different than this case, so in any event,
8 I don't think I was influenced one way or the other, but
9 I will admit or concede that I did watch one episode of
10 NCIS. It's a fairly popular program, I take it.

11 It's a fascinating case. It's a fairly close
12 case. I am not going to promise you a decision
13 tomorrow, but we will take our time and think about it
14 and do the best we can.

15 Thank you very much. The case is submitted.

16 ALL COUNSEL: Thank you, Your Honor.

17 (Whereupon, at 11:05 a.m., the proceedings were
18 concluded.)

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11 DATED: 03/27/2019 s/Susanne Bergling
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